IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-822

THE REPRESENTATION BOARD, *Petitioner*

v.

BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY, a division of
AIKEN INDUSTRIES, INC.;
DAVID B. LILLY CO., INC.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS BANNERCRAFT CLOTHING COMPANY, INC.; ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC.

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QUESTIONS PRESENTED

1. Whether a temporary stay of proceedings before the Renegotiation Board was within the jurisdiction of the district court where the litigants had shown a strong likelihood of success of securing a decree direct-

ing the Board to make specific relevant documents available for inspection under the Freedom of Information Act.

2. Whether, in the context of these cases, entering a temporary stay of proceedings before the Renegotiation Board was an abuse of discretion where the litigants had shown a strong need for access to the relevant documents to permit meaningful participation in the renegotiation process.

COUNTER STATEMENT OF THE CASE

Petitioner's statement of the case, while accurate, is only a summary of the Regulations of the Renegotiation Board as they appear in the Code of Federal Regulations 32 C.F.R. § 1421, *et seq.* (1972). The orders which are under review involve a considerable exercise of discretion by the trial judges. Thus, a more detailed factual statement is necessary for an evaluation of the issues in these cases.

I. Bannercraft Clothing Company, Inc.

Bannercraft Clothing Company, Inc. (hereinafter "Bannercraft") was engaged in the years 1966 and 1967 in the manufacture of military uniforms produced at a small plant in Philadelphia, Pennsylvania. Since Bannercraft's production during these years was almost entirely renegotiable pursuant to the Renegotiation Act, 50 U.S.C., App. § 1211, *et seq.* (1964), the company filed appropriate reports at the close of each fiscal year with the Renegotiation Board.[1] In late

[1] Contractors subject to the Renegotiation Act are required to file the "Standard Form of Contractors Report" on or before the last day of the fifth month following the close of the contractor's fiscal year. 50 U.S.C. App. § 1215(e)(1) (1964).

1969 and early 1970, representatives of the Eastern Regional Renegotiation Board (hereinafter "the Regional Board") conducted a review of Bannercraft's operations and had discussions with the president of the company. On February 20, 1970, the Regional Board, by letter, advised Bannercraft of its determination that the company had realized excessive profits in the amount of $1,400,000 in Fiscal Year 1967 (App. 28).[2]

Bannercraft responded by letter of February 24, 1970 (App. 29), requesting that the Regional Board:

> . . . furnish the contractor, pursuant to Section 1477.3[3] of the regulations, a written summary of

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[2] The following table is a summary of the Board's demands:

	1967	1966
1. Excess Profit Determination		
a. Regional Board:	$1,400,000	$ 75,000
b. Renegotiation Board:	1,450,000	75,000
2. Net Taxable Income as reported to Internal Revenue:	1,531,262	183,462
a. #1a. as % of #2:	91%	41%
b. #1b. as % of #2:	95%	41%
3. Net Profit for Renegotiation as adjusted and determined by The Renegotiation Board:	1,738,938	253,058
a. #1a. as % of #3:	81%	30%
b. #1b. as % of #3:	83%	30%

[3] 32 C.F.R. § 1477.3 provides:

> When a Regional Board has made . . . a final recommendation in a Class A case, . . . and the contractor is unable to decide whether to enter into an agreement for the refund of excessive profits so determined or recommended, the Regional Board or the Board, as the case may be, will furnish the contractor a written summary of the facts and reasons upon

> the facts and reasons upon which the determination was based. . . . Prior to reviewing the summary of facts and reasons, it is not possible to state whether all relevant evidence has been submitted since we have never had in writing the basis upon which you made this determination.

By letter dated March 2, 1970 (App. 30), the Regional Board responded to Bannercraft's request, stating in part:

> Your letter requests a Summary of Facts and Reasons pursuant to the provisions of RBR 1477.3. However, you do not make the statement required by that regulation that the contractor has submitted all of the evidence which it believes to be relevant to the renegotiation proceedings. Accordingly, your request for a summary is defective.

This tortuous exchange precipitated further correspondence (App. 31), and finally the Regional Board supplied Bannercraft with the Summary of Facts and Reasons. Based in part on information which was referenced in or whose existence was suggested by that Summary, Bannercraft on March 16, 1970, submitted a written request to the Renegotiation Board for production of six categories of documents (App. 32-33), pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552 (1970) (hereinafter

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which such final determination or recommendation is based in order to assist the contractor in determining whether or not it will enter into an agreement: *Provided*, that the contractor requests such a statement within a reasonable time after it has been advised of such final determination or recommendation, *and states that it has submitted all the evidence which it believes to be relevant to the renegotiation proceedings.* [Emphasis added]

"FOIA"). A panel of the Board held a meeting with representatives of Bannercraft on April 10, 1970. Bannercraft requested that the meeting be continued until after the Board had responded to its request of March 16, 1970.[4] The Board rejected Bannercraft's request.

By letters dated April 29, 1970, the Board notified Bannercraft of its unilateral determination that it had realized excessive profits of $75,000 in its Fiscal Year 1966 (App. 34) and $1,450,000[5] in its Fiscal Year 1967 (App. 35). Bannercraft was directed to reply by May 12, 1970, stating its acceptance or rejection of the Board's demand. Still bereft of any information relating to factual support for the Board's conclusions, and having received no response to its FOIA request, Bannercraft, on May 1, 1970, filed in the United States District Court for the District of Columbia a complaint pursuant to the FOIA seeking to temporarily restrain and enjoin the Board from withholding the requested documents and from proceeding with renegotiation with the company until the documents were produced (App. 24-27, 36-41). A pleading incorporating a motion to dismiss and opposition to the application for a temporary restraining order and preliminary

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[4] This request was based on the decision handed down in *Grumman Aircraft Eng'r Corp.* v. *Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970), filed March 10, 1970, by the United States Court of Appeals for the District of Columbia Circuit. The court ruled that the Board was subject to the provisions of the Freedom of Information Act and that certain Board documents were required to be disclosed under the Freedom of Information Act. See the same case on remand, 325 F. Supp. 1146 (D.D.C. 1971) *aff'd*, No. 71-1730 (D.C. Cir., July 3, 1973).

[5] The Board provided no explanation whatsoever for the increase from $1,400,000 to $1,450,000 for Fiscal Year 1967.

injunction was filed on behalf of the Board on May 5, 1970 (App. 42). On May 6, 1970, the district court heard oral argument, considered the pleadings, and denied the motion to dismiss while granting a temporary restraining order (App. 44-45).

Thereafter, the Board filed an opposition to the motion for preliminary injunction and renewed its motion to dismiss supported by an affidavit of the Chairman of the Board, Lawrence E. Hartwig (App. 46-48). On May 15, 1970, after a full hearing in open court, the court entered a preliminary injunction, predicating Bannercraft's likelihood of success under the FOIA on *Grumman Aircraft Eng'r Corp.* v. *Renegotiation Board*, 425 F. 2d 578 (D.C. Cir. 1970), and concluding, therefore, that further Board proceedings should be stayed pending the Board's compliance with the Act (Pet. App. B, pp. 45a-46a).

Bannercraft received the requested Statement of Facts and Reasons on May 21, 1970 for the Fiscal Years 1966 and 1967 and, on May 27, 1970 sent the Board an additional request under the FOIA to examine documents related to the factual basis for the Board's conclusions reflected in the Statement. The Board finally responded to Bannercraft's requests of both March 16, 1970 and May 27, 1970 by letter dated July 21, 1970[6] (App. 52-59), and except for a few standard form negotiation agreements and clearance notices with all details blanked out,[7] refused to produce any of the documents requested by Bannercraft.

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[6] The Act provides, at 5 U.S.C. § 552(a)(3), that such requests be acted on "promptly."

[7] Sample forms of these documents appear at 32 C.F.R. § 1498.1 and § 1498.6.

On August 4, 1970, the Board filed a motion to dissolve the preliminary injunction supported by an affidavit and memorandum (App. 50-51), contending that their review and denial of respondent's requests, as detailed in the Board's letter of July 21, 1970 (App. 52-59), constituted full compliance with the FOIA. A hearing on this motion was held on August 13, 1970, and, after an examination by the court of the documents submitted by the Board, the court denied the motion to dissolve the preliminary injunction (App. 61).[8] The Board then filed a Notice of Appeal.

II. Astro Communication Laboratory

Astro Communication Laboratory is a division of Aiken Industries (hereinafter "Astro"). The renegotiation proceedings involving Astro, insofar as they are applicable to this case, began on April 17, 1970, when Astro requested a renegotiation conference and a panel meeting (to be held after the renegotiation conference) with the Eastern Regional Board (App. 9). To assist in its efforts to make these conferences meaningful, Astro requested the Board to schedule both meetings at a time after the Board had responded to a request for the examination of documents made by Astro pursuant to the FOIA. On April 20, 1970, Astro submitted to the Board its written request pursuant to the FOIA for five categories of documents relating to its renegotiation proceeding (App. 6-8). The renegotiation conference was held on May 12, 1970, although the Board had not then responded to the Freedom of Information Act request. During the conference,

[8] The preliminary injunction was entered by Judge John Lewis Smith, Jr., and the defendant's motion to dissolve the preliminary injunction was denied by Judge Edward M. Curran of the same court.

Astro was advised for the first time that the Regional Board had made a tentative determination of excessive profits in the amount of $225,000 and further, that the meeting with the panel of the Eastern Regional Board had already been scheduled for June 12, 1970.[9] On June 10, 1970 there had been no reply to the FOIA request, nor had Astro been advised of the basis for the Board's tentative determination of excessive profits of $225,000. Thus, Astro requested that the panel meeting with the Regional Board be postponed until the Board had responded to Astro's FOIA request (App. 10). The Board granted this request.

On July 21, 1970, the Board denied Astro's FOIA request in its entirety and refused to produce any of the requested documents. The Board cited exemptions (3), (4), (5), and (7) of the FOIA to justify its refusal to disclose the documents (App. 11-13). As with Bannercraft, many of the documents requested by Astro are now expressly made available to the public under the Renegotiation Board Regulations. *See* 32 C.F.R. §§ 1477.4, 1480.5 (1972).

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[9] Under the regulatory provisions then in effect, 32 C.F.R. § 1472.3 (1961), this scheduling would have denied the contractor a meaningful opportunity to prepare for the panel meeting. Indeed, the panel meeting was not mandatory, but rather could be requested at the contractor's option in the event he decided not to enter into a renegotiation agreement based on the tentative determination rendered in the conference. 32 C.F.R. § 1472.3(f) (1961). The timing provisions of § 1472.3(h) clearly were designed to provide the contractor a reasonable time in which to make the threshold determination as to whether a panel meeting was desired in the first instance. The schedule sought to be imposed by the Board here would have required the contractor to short-circuit either the analysis necessary to deciding whether to request a panel meeting, or the preparation incident to the meeting itself.

On July 30, 1970, the Board approved the July 21, 1970 decision of its General Counsel and denied the request of Astro in its entirety (App. 14). The following day, July 31, 1970, Astro's counsel was informed by the Regional Board that the meeting with the Regional Board panel had been rescheduled for August 17, 1970. This date was later postponed to August 24, 1970 (App. 15).

On August 11, 1970, Astro filed a complaint with the district court pursuant to 5 U.S.C. § 552(a)(3), requesting the court to enjoin the Board from refusing to disclose documents requested by Astro and to enjoin further renegotiation until the Board complied with the FOIA (App. 2-5, 16-20). After oral argument on August 21, 1970, the district court (Pratt, J.) entered an order concluding that the Board had repeatedly denied requests for production of documents made by Astro and by others; that unless the Board was enjoined from continuing the renegotiation proceedings with respect to Astro's Fiscal Year 1967, the Board would proceed to a final determination prior to judicial review of Astro's right to the inspection of the documents.[10]

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[10] This conclusion was not mere speculation. The district court denied a similar injunction in *Grumman Aircraft Eng'r Corp.* v. *Renegotiation Board*, see note 4 *supra*, and the Board proceeded to a final determination without awaiting judicial review of its denial of Grumman's request for documents. At the time that Grumman's entitlement to the documents was determined, the Board no longer had jurisdiction since Grumman had filed its petition in the Tax Court. On July 27, 1971, the petition was subsequently transferred to the Court of Claims for a redetermination of the asserted excessive profits (Ct. Cl. Docket No. 569-71). The identical situation was repeated in *Holly Corp.* v. *Renegotiation Board*, Civil No. 1239-70 (D.D.C., May 12, 1970) (unreported), where Judge John Lewis Smith, Jr., who entered

The district court concluded, based upon the decision of the United States Court of Appeals for the District of Columbia Circuit in *Grumman Aircraft Eng'r Corp.* v. *Renegotiation Board, supra,* that Astro would likely succeed in the litigation and that it was appropriate to direct the Board to delay further steps in the renegotiation proceedings pending final determination of Astro's entitlement to inspect the documents.

The order directed the Board to allow Astro, within thirty days, to inspect and obtain copies of all documents requested by Astro which the Board, upon reconsideration, had no objection to producing, and to submit to the court, *in camera,* within thirty days from the date of the order, all documents which the Board objected to producing, with a statement of the reasons for each such objection (Pet. App. B, pp. 47a-49a).

At the eleventh hour, the Board asserted a claim of Executive Privilege for those documents which the court had ordered to be produced for *in camera* inspection. The court directed the Board to submit the documents to the court for *in camera* inspection in order to review the Board's claim of Executive Privilege but, on September 29, 1970, the Board filed notices

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the preliminary injunction in *Bannercraft,* decided that the facts of the *Holly* case did not warrant enjoining the renegotiation procedures, and Holly was forced to file a petition with the Court of Claims before determination of its entitlement to inspect the requested documents (Ct. Cl. Docket No. 843-71). The *Holly* case was subsequently settled and the petition dismissed. The Rules of the Court of Claims respecting renegotiation cases require that the petitioner post a bond in the amount of 100% of the Board's final net determination to prevent collection procedures by the United States pending redetermination on the merits by the Court of Claims (Ct. Cl. R. 26(b)).

of appeal with respect to that issue and the issue involved herein.[11] Thereafter, the United States Court of Appeals for the District of Columbia Circuit ordered the *Bannercraft* and *Astro* cases consolidated for hearing with that of *David B. Lilly Company, Inc.*, No. 71-1025. The cases were argued on Mareh 9, 1972 and decided on July 6, 1972, where the court of appeals affirmed the actions of the district court in a 2 to 1 decision (Pet. App. A, pp. 1a-44a).

The majority opinion rationalized: that the emphasis of the Renegotiation Act is upon informal negotiation; that respondents could not participate in such meaningful negotiations without the documents requested under the Freedom of Information Act; that the district court had inherent equitable power to maintain the *status quo* by temporarily enjoining the Board proceedings; that the court was not being asked to rule on the merits of the case; and that since exclusive jurisdiction for judicial review of a dispute under the Freedom of Information Act lies in the district court, there was no administrative remedy to exhaust.

The dissent departed from the majority view primarily on the basis that the court lacked jurisdiction to enjoin the Board proceedings and that the renegotiation process was intended by Congress to be one in which the Board is not required to "reveal their hand." Thus, the Government should not have to disclose the requested documents except from time to time as it suited the Board's bargaining position.

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[11] The appeal which involves the issue of the claim of Executive Privilege is not involved in this proceeding. See decision below, 466 F.2d at 348, n.2 (1972), and unpublished order of the court of appeals, dated July 6, 1972, denying the application for interlocutory appeal.

SUMMARY OF ARGUMENT

The Renegotiation Board is subject to the Freedom of Information Act. This Act unequivocally directs agencies to make available to any member of the public, those documents which are not specifically exempt under the nine categories of exemptions listed in the Act. Judicial review of an agency refusal to comply with the Act is within the exclusive jurisdiction of district courts, where the proceedings are *de novo* and the burden of establishing the exemption from the documents is on the agency.

District courts have inherent power to temporarily stay agency proceedings, particularly where there is no judicial review of the agency process. A contractor, upon completion of renegotiation proceedings, is entitled to *de novo* review of a determination of excessive profits in the United States Court of Claims. At each step of the proceedings before the Renegotiation Board, however, the contractor has an opportunity to attempt to negotiate and make settlement with the Board on the amount of excessive profits realized during the fiscal year.

The Renegotiation Act and the Board's Regulations require the Board to appraise the contractor's performance by comparison with contractors of a similar size and like nature. When the Board refuses to disclose the names of the contractors with whom the particular party is being compared and denies him access to any information bearing on his relative performance, the contractor is denied the opportunity of making an informed judgment as to the reasonableness of the Board's demands at each step of the renegotiation process. Since a member of the public is entitled to

the information sought by respondents in the district court, *Grumman Aircraft Eng'r Corp.* v. *Renegotiation Board,* 425 F.2d 578 (D.C. Cir. 1970), *on remand,* 325 F. Supp. 1146 (D.D.C. 1971), *aff'd,* No. 71-1730 (D.C. Cir., July 3, 1973), the Board's wrongful and arbitrary refusal to make the documents available to companies involved in the renegotiation process justified temporary intervention in the form of equitable relief. Because such intervention would normally be of a very short duration, depending upon the Board's promptness in complying with the Freedom of Information Act, there is no basis for concluding that the district court abused its discretion here.

Furthermore, the Congress has required the United States Government and prospective contractors alike to make full disclosure of all facts at their disposal during the negotiation of a contract. Accordingly, no logic can justify different treatment of the contractor when the same contract, after performance, is subject to renegotiation.

ARGUMENT

I.

The District Courts Correctly Found That the Respondents Were Likely To Succeed in the Action Brought Under the Freedom of Information Act

The court of appeals correctly concluded that the FOIA applies to the Renegotiation Board and, relying upon *Grumman Aircraft Eng'r Corp.* v. *Renegotiation Board, supra,* found no basis for disturbing the findings of the district court. While the merits of the FOIA case were not before the court of appeals, the court expressly and necessarily concluded a likelihood of success warranting injunctive relief. Notwithstand-

ing that the *Grumman* decision was handed down on March 10, 1970 (several weeks before the first complaint was filed in the instant cases) and that the *Grumman* court unequivocally held the Renegotiation Board to be subject to the FOIA and the documents requested by Grumman to be subject to disclosure,[12] the Board nevertheless refused to abide by the *Grumman* decision. Moreover, as is reflected in the Board's rulings on the Bannercraft and Astro requests, the Board in refusing to follow *Grumman* employed a shotgun or blanket-type approach and invoked every conceivable exemption in the FOIA, including 5 U.S.C. § 552(b)(3), (4), (5), and (7) (App. 11-13; 52-59).

At the outset, it should be noted that the record of the Renegotiation Board under the FOIA has been, at the very minimum, one of extreme reluctance and perhaps more fairly, one of outright defiance. For example, in the *Astro* case below, the Board, after attempting to take advantage of a number of the Act's exemptions, responded to a court order for *in camera* inspection (Pet. App. B, p. 49a) with a belated claim of Executive Privilege. When the court responded with a further order directing *in camera* inspection for judicial review of the claim of Executive Privilege, the Board noted an appeal. That appeal is not before this Court.[13]

Upon remand to the district court in the *Grumman* case after the first court of appeals decision, the Board

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[12] The categories of documents which the court found not to be exempt in *Grumman* are similar to those documents requested by respondents here.

[13] *See* note 11, *supra*.

again sought refuge in a variety of exemptions in the FOIA, and, after these defenses were overruled by the court, "the Government moved for rehearing under Rule 59, Federal Rules of Civil Procedure, requesting the district court to consider a formal claim of Executive Privilege by the Chairman of the Renegotiation Board for the first time during the litigation." [*Grumman Aircraft Eng'r Corp.* v. *Renegotiation Board, supra,* Slip Op. at 22]. In affirming the district court's denial of the belated claim of Executive Privilege, the court concluded:

> . . . It hardly follows that the Government should be allowed to play cat and mouse by withholding its most powerful cannon until after the district court has decided the case and then springing it on surprised opponents and the judge. In saying this, we do not mean to suggest that this particular cannon, in the context of this case, is any more than a pop gun. If the claim were indeed of such gravity as the Government now suggests, we can only wonder why the Government failed to alert the district court in a less extraordinary manner. [Slip Op. at 24]

Even where the Renegotiation Board has abandoned its stalling tactics and has made a gesture at compliance with the Act, it has done so only by releasing documents with such deletions that the material becomes virtually meaningless. Understandably, the courts have found such disclosure inadequate. *See, e.g., Fisher* v. *Renegotiation Board,* 473 F.2d 109 (D.C. Cir. 1972).

While the courts have not hesitated where appropriate to enjoin Renegotiation Board proceedings pend-

ing compliance by the Board with the FOIA,[14] they have not blindly enjoined the Renegotiation Board proceeding merely on a showing that the Board was consistently refusing to comply with the FOIA. For example, in *Holly Corp.* v. *Renegotiation Board,* Civil No. 1239-70 (D.D.C., May 12, 1970) (unreported), Judge Smith, who entered the injunction in *Bannercraft,* refused to enter a preliminary injunction under similar circumstances, because the Board had not issued a final denial nor unreasonably delayed in processing Holly's request for disclosure under the FOIA.

In the instant proceedings, the Board's refusal to disclose requested information constitutes a final denial, and the district court here found that plaintiffs had demonstrated a likelihood of success in the FOIA litigation—a finding that has been fully vindicated by the subsequent decisions of the court of appeals in *Grumman, supra,* and *Fisher, supra.*

II.

The District Court Had Jurisdiction To Temporarily Stay the Renegotiation Proceedings

It is true that the Freedom of Information Act does not in express terms provide for enjoining on-going administrative proceedings. It is equally clear that nothing in the Act can be read to forbid the exercise of injunctive relief by a federal court.

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[14] *See, e.g., American Mfg. Company of Texas* v. *Renegotiation Board,* Civil No. 1246-71 (D.D.C. June 23, 1971) (unreported) (Gesell, J.), *aff'd per curiam,* No. 71-1760 (D.C. Cir., Oct. 19, 1972). The preliminary injunction was affirmed *per curiam* on October 19, 1972 (D.C. Cir., No. 71-1760) and is now held in abeyance by stipulation pending decision of this Court in the instant cases.

> One thing is clear. Where Congress wished to deprive the courts of this historic power, it knew how to use apt words—only once has it done so and in a statute born of the exigencies of war.
>
> We conclude that Congress, by § 402(b) of the Communications Act of 1934, has not deprived the Court of Appeals of the power to stay—a power as old as the judicial system of the nation. [*Scripps-Howard Radio, Inc.* v. *FCC,* 316 U.S. 4, 17 (1942)].[15]

In the *Scripps-Howard* case, the Government contended that a specific grant of injunctive relief in a statute for one purpose implicitly limited the exercise of the general injunctive authority of the court to the express statutory authorization. This Court specifically disposed of this contention:

> The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policies in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary power to the federal courts. [316 U.S. at 11].[16]

The case most heavily relied upon by the petitioner here is *Sears, Roebuck & Co.* v. *NLRB,* 433 F.2d 210 (6th Cir. 1970). There the court affirmed the principle that proceedings before the National Labor

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[15] *See Mitchell* v. *Robert De Mario Jewelry, Inc.,* 361 U.S. 288, 291-2 (1960). *See also Porter* v. *Warner Holding Co.,* 328 U.S. 395, 398 (1946), and *Hecht* v. *Bowles,* 321 U.S. 321, 329 (1944).

[16] *See Murray* v. *Kunzig,* 462 F.2d 871 (D.C. Cir. 1972).

Relations Board would not be enjoined since there is an appropriate method of review of the proceeding in the courts of appeals pursuant to 29 U.S.C. § 160. Citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), the Sixth Circuit further pointed out in the *Sears* case that the court's review of NLRB decisions includes procedural as well as substantive errors.

By contrast, there is no judicial review of proceedings of the Renegotiation Board. Rather, the proceeding is *de novo* in the United States Court of Claims. That distinction is critical here. Errors in Board proceedings which might permit a contractor to enter into a bilateral agreement disposing of this case are never subject to correction. The determination of excessive profits at each stage is subject to increase or decrease as it is in the Court of Claims. While a *de novo* proceeding has obvious merit in renegotiation cases, the inability of the Court of Claims to correct errors in the renegotiation process distinguishes this situation clearly from that pertaining to the NLRB and other agencies where there is direct appellate review of the entire proceeding.

III.

The Respondents' Demonstrated Need for the Documents Fully Supports Temporary Injunctive Relief

A. The Importance of the Requested Data to the Renegotiation Process

The Renegotiation Act contains a definition of excessive profits which is stated in very broad and general terms.[17] Since the Board has never published regulations under item No. (6), the first five numbered

[17] In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities,

items in this definitional section, known as the statutory factors, comprise the basic statutory guidelines for determining when profits are excessive. Since the Renegotiation Act directs that favorable recognition must be given to the efficiency of the contractor, with particular regard to quantity and quality production, reduction of costs, and economy in the use of materials, facilities and manpower, the determination of the amount, if any, of excessive profits must necessarily include an evaluation of the contractor's performance in comparison with the performance of other contractors producing the same or similar items. Indeed, the Board's Regulations specifically so provide:

> *Comparisons.* In evaluating the contractor's performance, comparisons will be made with the prices, costs and profits of other contractors engaged in the production of the same or similar products or using the same or similar processes. [32 C.F.R. § 1460.2(c)]

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and manpower; and in addition, there shall be taken into consideration the following factors:

(1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;

(2) The net worth, with particular regard to the amount and source of public and private capital employed;

(3) Extent of risk assumed, including the risk incident to reasonable pricing policies;

(4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

(5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

(6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted. 50 U.S.C. App. § 1213(e).

The contractor cannot, of course, make an informed judgment as to his relative efficiency, reasonableness of prices, costs or profits without an opportunity to examine the performance data of the companies with whom he is being compared. In Bannercraft's request under the FOIA, information was requested with respect to eleven companies which Bannercraft believed to be engaged in Government contracts for the sale of goods identical or similar to its own (App. 32-33). The Board's reply reflects that between the years 1962 and 1968, eight clearance notices and one renegotiation agreement were effected with the companies included in this list. A copy of these documents was provided Bannercraft but with all of the information deleted such that the material was worthless for comparative purposes (App. 52-59). These were the documents presented to the district court in connection with the Board's motion to dissolve the injunction (App. 50-51). After reviewing the documents, the court promptly denied the Board's motion (App. 61).

Although the Board has never further responded to this request of Bannercraft, the Board's Regulations since February 24, 1971 provide that the public shall have access to fifteen categories of documents, including agreements determining excessive profits, orders determining excessive profits, and statements of fact and reasons issued by the Board. *See* 32 C.F.R. § 1480.5 (1972). This Regulation concludes with the following:

> Without regard to the provisions of 5 U.S.C. Section 552(a)(2), the Board will also make available for public inspection and copying summaries of facts and reasons issued by the Board.

Nevertheless, the Board continues to refuse to honor Bannercraft's and Astro's timely requests for this information concerning companies making the same or a

similar product. Rather the Board apparently continues to adhere to its initial response which is that:

> The Board did not issue a final opinion (Statement of Facts and Reasons) to any of such manufacturers for any of the specified years. The Board did issue one Summary of Facts and Reasons to one contractor in such group. In my opinion, such Summary is exempt under 5 U.S.C. § 552(b)(3), (4), (5) and (7) and RBR § 1480.9 (a)(3), (4), (5) and (7). [App. 54]

A demand from the Board, as in the case of Bannercraft (*See* note 2, *supra*), that a contractor return either 95% or 83% of his total net profit for the year (percentage dependent upon whether one uses the net taxable income as reported to Internal Revenue or as adjusted by the Renegotiation Board) coupled with a refusal even to identify the contractors with whom he was compared, as well as a refusal to disclose the relative prices, costs and profits of those companies with whom the contractor was compared, justified the equitable intervention of the district court.

Bannercraft, for example, as a company consisted of the president and one secretary with the remainder of its personnel being production employees. The amount of front office overhead allowed to other contractors which would reduce their net profit would be an important factor in making the required comparison. A contractor who performs efficiently should not be penalized in renegotiation.[18] As the Tax Court

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[18] Yet in the instant case, it is unclear whether inefficiency or efficiency is being penalized. In the renegotiation proceedings for fiscal 1967, the Board disallowed $74,000 of Bannercraft's executive compensation expenses in computing renegotiable profits, recognizing as valid executive compensation expense only 62% of that allowed for tax purposes by IRS. Bannercraft's total executive compensation for 1967 amounted to only 5% of total sales in that year, a figure that may or may not compare very favorably with

so clearly pointed out in *Martin Mfg. Co.* v. *Renegotiation Board,* 44 T.C. 559, 566 (1965):

> We do not think that it was the intention of Congress to have the profits on Government contracts renegotiated merely because a contractor, by carefully estimating costs and maintaining high standards of efficiency and thrift in its manufacturing process, is able to attain a favorable profit percentage ratio. To do so would penalize the contractor for the very practices which the Government sought to encourage.

Without the comparative data on companies similarly situated, Bannercraft cannot make an informed judgment as to whether its profits are in some amount excessive.

B. The Renegotiation Board's Duty To Disclose the Requested Information

The interrelationship of the Freedom of Information Act and existing regulatory authority is clear. The FOIA does not exempt but specifically includes all agencies of the Federal government. As President Johnson pointed out on signing Public Law 89-487 on July 4, 1966, the Act was truly a major historic event in the political history of this country.

> I have always believed that freedom of information was so vital that only the national security, not the desires of public officials or private citizens, should determine when it must be restricted.

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other Government contractors. Without disclosure of the comparative cost figures of other contractors against whom Bannercraft was measured, however, Bannercraft's opportunity to challenge Board determinations at the next level in the proceedings is rendered essentially meaningless—the Board has denied Bannercraft access to relevant information on which an informed decision could be predicated.

The FOIA like other statutes recently enacted by Congress,[19] establishes an important policy for all agencies of Government. The statutory responsibilities of each agency must be re-evaluated in light of the purposes Congress sought to achieve through the FOIA.

The history of litigation under the FOIA indicates that some agencies initially demonstrated an uncertainty as to the scope and depth of congressional intent.[20] Each of the agencies subject to the Act has adopted regulations including appeal procedures within the agency as guides for requesting and securing access to documents within the control of the agency. *See, e.g.*, 32 C.F.R. § 1480.

The Act makes information available to the public for public inspection and "it seems to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA* v. *Mink*, 41 U.S. L.W. 4201, 4203 (U. S. Jan. 23, 1973). Certainly, one involved in an administrative-type proceeding[21] has as broad a right to information within the possession of the agency as a member of the public. Where an agency denies access to documents any person may seek judicial review of the denial.

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[19] *Cf.* National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (1970).

[20] *See, e.g., EPA* v. *Mink*, 41 U.S.L.W. 4201 (U.S. Jan. 23, 1973); *Getman* v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1971); *Sears, Roebuck & Co.* v. *NLRB*, 433 F.2d 210 (6th Cir. 1970); *Grumman Aircraft Eng'r Corp.* v. *Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970); *Ackerly* v. *Ley*, 420 F.2d 1336 (D.C. Cir. 1969); *Wellford* v. *Hardin*, 315 F. Supp. 175 (D. Md. 1970), *aff'd*, 444 F.2d 21 (4th Cir. 1971).

[21] The Renegotiation Board is not subject to the Administrative Procedure Act except 5 U.S.C. § 552. *See* 50 U.S.C. App. § 1221.

The question posed here, then, is whether a person who will be adversely affected by agency must sit idly by and suffer what may be an irreversible injury while the agency litigates the issue of access to documents through the federal court system. The statement of the question fairly suggests the answer. Injunctive relief is always discretionary. Such relief should not be set aside unless the reviewing court finds a clear abuse of such discretion.

Yet mere allegation that an agency has not complied with the FOIA does not imply that there should be an automatic stay of administrative agency proceedings under all circumstances, nor will injunctive relief be accorded a litigant where the agency procedures provide for discovery and where agency compliance with due process rights can be evaluated by the reviewing court.[22] The renegotiation process, however, contains no provision for discovery and no provision requires the Board at any stage of the proceedings to reveal the comparative cost data underlying its determinations. Yet, at each stage of the proceedings, a contractor unwilling to make an uninformed judgment as to whether an excess profits determination is fair or reasonable and accede to the Board's demand risks an increase in the amount demanded. Conversely, the Renegotiation Board at all times has complete access to the contractor's financial records, as do the audit agencies in the various departments of Government and the General Accounting Office. The contractor, in effect displays the dummy hand during renegotiation while the Board plays its cards close to the vest.

If the position of the dissenting judge below had validity prior to the passage of the FOIA, it can retain

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[22] *Sears, Roebuck & Co.* v. *NLRB*, 433 F.2d 210 (6th Cir. 1970); *but see Bristol-Myers* v. *FTC*, 424 F.2d 935, 940 (D.C. Cir. 1970).

no vitality in light of the clear congressional mandate that the citizenry of this country be informed. The administrative process must function with due regard to the broad policies of statutes, such as the FOIA, that apply to all agencies. The dissent stresses a right of the Renegotiation Board to control a contractor's access to information, to permit the Board to strengthen its bargaining position or to avoid disclosing weaknesses in its position.

> But while noting these facts, the majority seems to ignore one of the critical aspects of negotiation that sets it apart from litigation as a device for resolving disputes: the skillful negotiator carefully guards and controls his adversary's access to the critical bits of information that would reveal the strengths or weaknesses of his bargaining position. [466 F.2d at 366].

No authority is cited to support this proposition, and we submit this is not a supportable statement of federal policy.

In the Truth in Negotiations Act, 10 U.S.C. § 2304, *et seq.* (1970) (Pub. L. No. 87-653), Congress directed that both parties to the negotiation of a Government contract be fully informed. The Regulations implementing this statute provide in part:

> If at any time prior to agreement on price the contracting officer learns through audit or otherwise that any cost or pricing data submitted is inaccurate, incomplete or noncurrent, he shall immediately call it to the attention of the contractor whether that defective data tends to increase or decrease the contract price. [32 C.F.R. § 3.807-5 (b)]

The Comptroller General has implemented this mutual full disclosure policy in at least two decisions:

> . . . the Truth in Negotiations Act, requires that all significant cost or pricing data *available to one*

> *party* to contract price negotiations be *completely disclosed* to the *other party* so that they may negotiate on *equal terms* and establish a price that will be fair and reasonable to both. [Comp. Gen. Dec. *B-156313* (Aug. 31, 1967), unpublished; emphasis in original]

Subsequently, the Comptroller General ruled:

> The legislative history of P.L. 87-653 discloses that one of its primary purposes was to require full, complete and accurate data and disclosure by both parties. [47 Comp. Gen. 336 (1967).]

The courts have also consistently held that superior undisclosed knowledge of a Government agency is a valid basis for affording one dealing with the Government relief in the form of money damages.[23] This well-established policy is not to be lightly turned aside in the context of renegotiation, particularly where in the formation of contracts subject to renegotiation full disclosure is required.

At each step of the renegotiation process a contractor has an opportunity to agree to a disposition of the claim, and this judgment cannot be fairly made without an evaluation of the factors that the Renegotiation Act specifies as the critical factors for determining the existence of and the amount of excessive profits. Given the historic equity powers of the federal courts to enter injunctive relief, a determination of whether the exercise of that discretion was abused in the context of these cases requires consideration of the importance of access to the documents by the

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[23] *H. N. Bailey & Associates, Inc.* v. *United States*, 196 Ct. Cl. 166, 449 F.2d 376 (1971); *Helene Curtis Industries, Inc.* v. *United States*, 160 Ct. Cl. 437, 312 F.2d 774 (1963).

parties during the renegotiation process. Although "need" is not a prerequisite for production under the FOIA, need is certainly an important value in determining the propriety of staying temporarily the renegotiation process.

While *de novo* review is afforded in the Court of Claims,[24] a contractor cannot stay enforcement of the final order of the Board unless he has the resources to post a bond with the court in the amount equal to 100% of the Board's final determination.[25] A final order of the Board carries interest from 30 days after the date it is entered at an interest rate determined by the Board, and independent of the factor of time and expense consumed in Court of Claims litigation. Furthermore, under the Renegotiation Act the court is free to increase the final determination of the Board. 50 U.S.C. App. § 1218. An uninformed contractor certainly faces substantial risks in deciding to accept or reject a determination at each level of the Board's proceedings, including the final determination of the Board.

Because of the risks inherent in the contractor's exercise of judgment at each step of the process and his unassailable need to examine documentary evidence used by Board personnel at each step of the process, proceedings before the Renegotiation Board pose a peculiarly appropriate setting for the discretionary exercise of injunctive relief where the agency deter-

[24] Jurisdiction to undertake *de novo* review of Renegotiation Board proceedings was transferred from the United States Tax Court to the Court of Claims by Act of July 1, 1971, Pub. L. No. 92-41, §§ 2(b), 3(a), 85 Stat. 97, 98, *amending* 50 U.S.C.A. App. § 1218 (1970).

[25] Ct. Cl. R. 26(b).

minedly refuses to comply with an important legislative enactment such as the FOIA.

Thus the record here clearly demonstrates that respondents face irreparable injury and do not have an adequate remedy at law. Where the remedies for agency non-compliance with the FOIA have been specifically provided by Congress, those remedies should not be permitted to become a nullity as a result of the Board's stubborn refusal to act in accordance with the unequivocal congressional mandate manifested in the Freedom of Information Act.

IV.

A Balancing of the Equities Clearly Justifies Injunctive Relief

As the court of appeals so clearly pointed out, injunctive relief in these circumstances should ordinarily encompass only a few days. The fact that the instant cases have consumed a substantial period of time simply reflects the fact that they are test cases which the Board has seen fit to litigate through this Court rather than to undertake prompt compliance with the FOIA.

The petitioner's reliance on *Lichter* v. *United States,* 334 U.S. 742 (1948); *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752 (1947); and *Macauley* v. *Waterman Steamship Corp.,* 327 U.S. 540 (1946) is misplaced in the context of the instant cases. If anything, these cases support the jurisdiction of a court to grant relief, since in each opinion the Court did not deny the jurisdiction of the district court to enjoin renegotiation proceedings in appropriate cases. Rather, in each of these cases, this Court found only an absence of jurisdiction in the district court to

consider the merits of matters over which Congress by statute had vested jurisdiction in the first instance in the Renegotiation Board, and thereafter in the United States Tax Court. Here, the district court is not being asked to make a determination on any issue which, pursuant to the Renegotiation Act, is within the jurisdiction or expertise of either the Renegotiation Board or the Court of Claims. Exclusive jurisdiction to determine FOIA controversies has been lodged with the district courts in the first instance. 5 U.S.C. § 552(a)(3). Furthermore, the Renegotiation Board possesses no expertise relating to the FOIA.

With respect to the question of exhaustion of remedies, which was the principal basis for the Court's disposition of *Macauley*, *Lichter*, and *Aircraft & Diesel Equipment Corp., supra,* the court of appeals discussion in the decision below is both comprehensive and correct. The basic doctrine of exhaustion of administrative remedies is well ingrained in the field of administrative law but has no application here. The question unanswered by the above cases and remaining focal here is whether an administrative agency must be granted complete deference when that agency acts outside the scope of its congressionally assigned responsibilities and in fact exceeds the bounds of its proper jurisdiction.

CONCLUSION

For the foregoing reasons, respondents submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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